Tuf-Flex Glass, a part of Libby-Owens-Ford Company *and* Miscellaneous Warehousemen, Airline, Automotive Parts Service Tire and Rental, Chemical & Petroleum, Ice, Paper, & Related Clerical & Production Employees Union, 781, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 13-RC-15702

June 25, 1982

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 15, 1981, the Board issued a Decision[1] in the above-entitled proceeding in which it ordered that a hearing be held to resolve substantial and material factual issues raised with respect to the Employer's Objections 2 and 3 to an election held on April 10, 1981.[2]

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the Employer's Objections 2 and 3, and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs,[3] and hereby adopts the Hearing Officer's rulings,[4] findings,[5] and recommendations.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Miscellaneous Warehousemen, Airline, Automotive Parts Service Tire and Rental, Chemical & Petroleum, Ice, Paper, & Related Clerical & Production Employees Union, 781, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees of Tuf-Flex Glass, a part of Libby-Owens-Ford Company at its facility located at 752 Larch Avenue, Elmhurst, Illinois, 60126, but excluding all outside truck drivers, salesmen, professional employees, technical employees, office clerical employees, plant clerical employees, guards and supervisors as defined in the Act.

[1] Not reported in volumes of Board Decisions.

[2] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 14 for, and 8 against, the Petitioner; there were 2 challenged ballots, which were not sufficient in number to affect the election results.

[3] Although the Employer claims that Jose Gutierrez and Florentino Villalpando are not statutory supervisors, it also contends that the Hearing Officer erred in failing to make findings as to their supervisory status. In its exceptions, the Employer alleged for the first time that, if they were supervisors, their conduct in telling employees how to vote tainted the results of the election. This allegation does not appear in the Employer's objections, which alleged only misconduct by agents of the Union. The Board has long held that it will not consider, as objectionable, conduct which was neither alleged in a timely filed objection nor discovered by a regional director during the course of his investigation of such an objection, unless the objecting party presents clear and convincing proof that the unalleged misconduct not only is newly discovered but also was previously unavailable. *Burns International Security Services, Inc.*, 256 NLRB 959 (1981); *Parks Food Service*, 235 NLRB 1410 (1978); *Hecla Mining Company*, 218 NLRB 860 (1975). The Employer in this case has not even asserted that the evidence regarding the conduct of Gutierrez and Villalpando was newly discovered, much less previously unavailable. Accordingly, we reject the Employer's allegation as untimely.

[4] The Employer contends that the Hearing Officer committed prejudicial error by denying its motion to revoke Petitioner's *subpoena duces tecum*, which required the Employer to produce affidavits and statements taken from employees by its counsel. The Employer claims that these affidavits were protected from disclosure by the attorney-client privilege, citing *Upjohn Company* v. *United States*, 101 S.Ct. 677 (1981). In *Upjohn*, the Supreme Court held that communications made by nonmanagerial employees to counsel at the direction of their corporate superiors in order to secure legal advice from counsel were covered by the attorney-client privilege; however, the Supreme Court noted that the communications concerned matters within the scope of the employees' corporate duties which might bind the corporation, that the employees were made aware of the legal implications of the investigation, and that the communications were considered highly confidential when made. That is not the case here. The Employer affidavits herein concern statements made by nonsupervisory employees about the upcoming union election; such statements clearly are not matters within the scope of these employees' corporate duties which could bind the Employer. Nor is there any evidence in the affidavits or the testimony in this case that the Employer ever made the employees aware of the legal implications of the investigation or of the confidentiality of their statements to counsel. Further, we note that the Hearing Officer required the production of these affidavits only after the direct examination of each affiant called as a witness, for the purpose of cross-examination, rather than in the context of an internal corporate investigation of the facts as in *Upjohn*. Different considerations would seem to govern the confidentiality of such statements when produced at trial for use in impeaching a witness. Thus, once a witness has testified on direct examination about the matters covered in his affidavit, neither the Employer nor the employee can realistically assert much further interest in keeping the contents of his affidavit confidential. Accordingly, we affirm the Hearing Officer's denial of the Employer's motion to revoke.

[5] The Employer has excepted to certain credibility resolutions of the Hearing Officer. It is the established policy of the Board not to overrule a Hearing Officer's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no sufficient basis for disturbing the credibility resolutions in this case.

In discrediting certain testimony by Jose Gutierrez and Pedro Sanchez about threatening statements made by Salvador Arias, the Hearing Officer noted that those portions of their testimony were inconsistent with their Board affidavits; however, the Hearing Officer also noted that Sanchez' discredited testimony was not corroborated by Gutierrez' credited testimony or by the Employer affidavits taken from Sanchez and that Gutierrez' discredited testimony was inconsistent with both his own and Sanchez' Employer affidavits. Further, the Hearing Officer found that their discredited testimony was given in a confusing, imprecise, and conclusionary manner. Inasmuch as the Hearing Officer relied on other independent grounds as a basis for discrediting this testimony, we find it unnecessary to rely on the Board affidavits in adopting his credibility findings.